**Kaiser Steel Corporation *and* International Association of Machinists and Aerospace Workers, AFL-CIO, District Lodge No. 190, Local Lodge No. 1492.** Case 20-CA-15515

December 11, 1981

## DECISION AND ORDER

### BY CHAIRMAN VAN DE WATER AND MEMBERS JENKINS AND HUNTER

On July 30, 1981, Administrative Law Judge Timothy D. Nelson issued the attached Decision in this proceeding. Thereafter, Respondent filed exceptions and a supporting brief.

Pursuant to the provisions of Section 3(b) of the National Labor Relations Act, as amended, the National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the record and the attached Decision in light of the exceptions and brief and has decided to affirm the rulings,[1] findings,[2] and conclusions of the Administrative Law Judge and to adopt his recommended Order.

### AMENDED CONCLUSION OF LAW

In accordance with our finding in the second paragraph of footnote 2, *supra* we hereby amend the Administrative Law Judge's Conclusion of Law 4 to read as follows:

"4. By refusing to permit such striking employees to remove their personally owned tools from its Napa plant in order to impair their ability to obtain other employment during the strike and under circumstances where, absent a strike, Respondent normally permits its employees to remove their tools for their own purposes, Respondent has interfered with, restrained, and coerced employees in the exercise of rights protected by Sections 7 and 13 of the Act, and has discriminated against employees with respect to their terms and conditions of employment in order to discourage membership in, or activities on behalf of, labor organizations, and thereby has engaged in unfair labor practices within the meaning of Section 8(a)(1) and (3) of the Act."

## ORDER

Pursuant to Section 10(c) of the National Labor Relations Act, as amended, the National Labor Relations Board adopts as its Order the recommended Order of the Administrative Law Judge and hereby orders that the Respondent, Kaiser Steel Corporation, Napa, California, its officers, agents, successors, and assigns, shall take the action set forth in said recommended Order.

## DECISION

### STATEMENT OF THE CASE

TIMOTHY D. NELSON, Administrative Law Judge: International Association of Machinists and Aerospace Workers, AFL-CIO, District Lodge No. 190, Local Lodge No. 1492 (herein called Machinists), filed an original and amended unfair labor practice charge on July 22 and August 26, 1980,[1] respectively, against Kaiser Steel Corporation (herein called Kaiser). After an investigation, the Regional Director for Region 20 of the National Labor Relations Board issued a complaint and notice of hearing against Kaiser on August 27.

I heard the matter at Vallejo, California, on February 10, 1981.

The General Counsel and Kaiser each filed timely post-trial briefs which I have carefully considered.

### Question Presented

Did Kaiser violate Section 8(a)(3) and (1) of the National Labor Relations Act, as amended, by its admitted actions in prohibiting employees engaged in a protected strike from removing their personally owned tools from its struck plant premises, where its admitted primary motivation was to "pressure" strikers to abandon the strike by making it impossible for them to use their tools to obtain interim employment elsewhere, and under circumstances where Kaiser otherwise permits employees to remove their tools from the plant for their own use?

### FINDINGS OF FACT

There are no material disputed questions of fact. The findings below derive from the uncontradicted and credited testimony of the witnesses and the parties' stipulations.

There were four witnesses. Kaiser's personnel manager, Michael Brundy, testified, *inter alia*, that Kaiser has "a policy during strikes not to allow tools to be removed basically to pressure employees into accepting [Kaiser's proposed] agreement terms and going back to work,"[2]

[1] In accordance with his dissent in *Olympic Medical Corporation*, 250 NLRB 146 (1980), Member Jenkins would award interest on the backpay due based on the formula set forth therein.

[2] In finding that Respondent violated Sec. 8(a)(3) and (1) of the Act by enforcing its policy of refusing to permit its striking employees to remove their personally owned tools from Respondent's Napa, California, facility, we do not rely on the Administrative Law Judge's comment at par. 7 of the section entitled "Analysis and Conclusions" that *Fraley & Schilling, Inc.*, 211 NLRB 422 (1974), is dispositive of the case herein. We regard that case as distinguishable and rely instead on the remainder of his analysis.

We also note that, at par. 6 of the section entitled "Analysis and Conclusions," the Administrative Law Judge inartfully characterized Respondent's policy with respect to the removal of personally owned tools during the course of a strike. The record more accurately reflects that, absent a strike, Respondent normally permits its employees to remove their tools for personal use.

Chairman Van de Water and Member Hunter find it unnecessary to rely on *Gary-Hobart Water Corporation*, 210 NLRB 742 (1974), inasmuch as there is no "no-strike" clause at issue herein.

[1] All dates are in 1980 unless otherwise specified.

[2] Brundy also testified that another reason for preventing removal of tools, although of lesser significance to Kaiser, is the desire to minimize

*Continued*

and that this policy was implemented during a strike in July, as well as in some individual cases during strikes in 1974 and 1977, but that the policy has never been put in writing nor otherwise generally published. Machinists Business Representative Samuel Willis testified, *inter alia*, that he had never heard of such a policy until he learned that Kaiser had applied it during the July strike. Employees Robert Martin and James Boyles testified, *inter alia*, that Kaiser's agent, Brundy, refused to permit them to remove their tools during the July strike. I credit all of that testimony as just summarized in the main text, and make certain supplemental findings below.

Kaiser makes steel products at a plant in Napa, California,[3] where it employs about 850 employees who are represented by 8 craft unions, including the Machinists.

Kaiser requires its 50–70 journeymen machinists to furnish their own tool sets to use in connection with their normal work, just as it does its welders and electricians who are represented by other craft unions. These sets are normally stored in the plant. The tool sets owned by its journeymen machinists have a typical value of at least $2,500 per set. Except when they are on strike, Kaiser permits its employees to take their tools out of the plant. The record does not suggest that Kaiser claims any right to, or does, place any restrictions on, the use to which the employees may put those tools when they are thus removed.

In July, the Machinists and other craft unions including the Boilermakers were bargaining with Kaiser for new labor agreements to replace ones which had recently expired in their respective units. On July 11, the Boilermakers called a strike and established picket lines at the Napa plant. Employees represented by the Machinists honored the picket line and refused to work until the Boilermakers strike was called off on July 24.[4]

On July 14, journeyman machinist Martin located a job with another employer to tide him over during the strike. The job likewise required that he furnish his own tools. He went to Kaiser's plant on the same day to remove his toolset and Personnel Manager Brundy refused to allow him to do so. When Martin pressed the issue, Brundy said to him: "The only way that you're going to get any tools off this yard is if you terminate. That's up to you." Martin told fellow journeyman machinist Boyle about his experience and, together, they returned to the plant for a second try. Brundy again refused to permit either of them to remove their tools. After further discussion, however, Brundy permitted Martin and Boyle to enter the plant to apply a preservative to their toolsets so they would not rust while in disuse.

## Analysis and Conclusions

The General Counsel, citing *Erie Resistor*,[5] argues that Kaiser's admitted actions were "inherently destructive" of important employee rights under Section 7 of the Act, especially the right to strike, which is also the subject of special recognition in Section 13 of the Act.[6]

Kaiser, dismissing the quoted phrase above as mere "buzz words,"[7] argues that Kaiser simply used an "economic weapon" at its disposal by impounding strikers' tools during the strike. Kaiser analogizes its actions to another use of "economic weapons" legitimately reserved to employers—that of the lockout. Kaiser further argues that employees' rights under the Act have never been held to include the "right" to obtain outside employment during a strike without interference by the struck employer. Kaiser thus claims that the Act does not prohibit its tool-impoundment tactic.

Neither party has called my attention to strict decisional precedent. My own research discloses no cases which are factually the same, but I believe that the Board's decision in *Fraley & Schilling, Inc.*, 211 NLRB 422 (1974), is arguably pertinent. In that case, there was a strike by drivers for the employer, including some who were "owner-operators" who had title to trucks sold to them by the employer, but who also had entered into "exclusive lease-back" arrangements with the employer. During the strike, the employer sought to "repossess" the trucks stored by the owner-operators at their homes or at other locations away from the employer's terminal. Other owner- operators who did not join the strike were permitted to keep their trucks where they normally stored them. The Board found that the employer's conduct in this regard violated Section 8(a) (3) and (1) of the Act.

Although it is not clear that the striking owner-operators intended to use the trucks to gain revenues from hauling for other firms, the employer, in attempting to repossess the trucks, told one owner-operator that he would not be permitted "to use the truck elsewhere." *Id.* at 436.

Although the employer in *Fraley & Schilling* committed numerous independent violations of Section 8(a)(3) and (1) of the Act, the Board did not link its finding of a violation in the truck repossession instances to such additional violations. The Board merely concluded that it

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the possibility of sabotage or theft. I do not find it necessary, in view of my ultimate disposition, to determine whether these latter considerations played any role whatsoever in prompting the development of Kaiser's tool impoundment policy during strikes.

[3] In calendar year 1979, Kaiser sold and shipped from its Napa plant goods and materials valued in excess of $50,000 directly to customers outside California.

[4] Kaiser would characterize the Machinists actions as a direct economic strike; the General Counsel would characterize their behavior as a "sympathy strike"; i.e., a withholding of services calculated to help the Boilermakers achieve their own economic aims. Both parties acknowledge, however, that the appropriate label for the Machinists strike participation is irrelevant to a resolution of the central issue herein since, under either label, the refusal by Machinists to work was concerted activity protected by the Act. See, e.g., *Gary-Hobart Water Corporation*, 210 NLRB 742 (1974), enfd. 511 F.2d 284 (7th Cir. 1975), cert. denied 423 U.S. 925 (1975).

[5] *N.L.R.B.* v. *Erie Resistor Corp., et al.*, 373 U.S. 221 (1963).

[6] Sec. 7 of the Act guarantees to employees, *inter alia*:

> . . . the right to form, join, or assist labor organizations, to bargain collectively . . . and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection, and . . . the right to refrain from any or all such activities . . . .

Sec. 13 of the Act states:

> Nothing in this Act, except as specifically provided for herein, shall be construed so as either to interfere with or impede or diminish in any way the right to strike, or to affect the limitations or qualifications on that right.

[7] Kaiser's br., p. 4.

was "discriminatory" to "penalize" strikers in a "term or condition of employment" by repossessing the trucks. *Id.* at 423. No extended rationale was offered for this legal conclusion and, therefore, its applicability to the instant case is not entirely clear.

The facts in the instant case are seemingly less favorable to Kaiser on the point at issue than those in *Fraley & Schilling* were to that employer. There, the employer at least had a colorable claim to have the trucks used only in connection with his own work since he had an "exclusive lease-back" arrangement with the owner-operators. By contrast, Kaiser has not introduced evidence which would suggest that the machinists tools were to be used "exclusively" in connection with work at Kaiser. Indeed, to the contrary, the fact that nonstriking employees are permitted to remove their tools from the plant justifies the inference that they may be used by such nonstrikers for other employment.

Accordingly, I would sustain the complaint herein on the strength of the Board's disposition of *Fraley & Schilling*. My further analyses and conclusions below address Kaiser's arguments on their merits should a reviewing body determine that this is a case of first impression.

Kaiser stresses that its motive was not "antiunion" or "hostile," citing its longstanding "amicable" bargaining relationship with the Machinists. This much may be acknowledged: Kaiser's tool-impoundment actions were not shown to have been part of any broader attempt to "bust" the Machinists and to remove it as a bargaining agent. Cf. *Fraley & Schilling, supra*. Rather, Kaiser was simply exploiting its position as a *de facto* possessor[8] of the tools belonging to its employees to make it more difficult for them to obtain employment in their trade elsewhere during the strike—and thus to make them more tractable to Kaiser's bargaining demands.

Kaiser insists on this latter point, characterizing its actions as merely an effort to use "economic weapons" at its disposal to aid in achieving its collective-bargaining aims. And Kaiser places ultimate reliance on the admonition of the Court in *Brown Food Store*[9] that "the Act does not constitute the Board as an 'arbiter of the sort of economic weapons the parties can use in seeking to gain acceptance of their bargaining demands.'" (*Id.* at 283.) Kaiser further correctly notes that employers have been sustained in the use of certain "economic weapons" which impinge on the exercise of statutory rights, such as the use of postimpasse lockouts (*American Ship Building, supra*), and even lockouts while continuing to operate the business with replacements (*Brown Food, supra*).Thus, Kaiser would apparently have me hold that once an employer's actions against strikers may be characterized as the use of "economic weapons" which are merely employed in furtherance of some bargaining aim, such conduct is beyond the reach of the Act's proscriptions.

I reject Kaiser's position. Neither *Brown Food* nor *American Ship Building* took the Board out of the business of performing the "delicate task . . . of weighing the interests of employees in concerted activity against the interest of the employer in operating his business in a particular manner and of balancing in the light of the Act and its policy the intended consequences upon employee rights against the business ends to be served by the employer's conduct." *Erie Resistor, supra* at 229. Indeed, the Court in *Brown Food* adhered to the view that the Board must, in the exercise of its proper function, engage in such balancing tasks (*id.* at 282; see also *American Ship Building, supra* at 309).

Accordingly, while the Board may not be an "arbiter of the sorts of economic weapons the parties can use," neither may it abdicate its balancing task where, as I conclude below, Kaiser's choice of "economic weapons" conflicts with important employee rights under the Act. As the Court has recognized, this is an "often delicate" task, and it is especially so where the Court has not clearly defined the extent to which the "economic" impact of an employer's actions on the exercise of protected rights by employees may properly influence the "balancing" process.

It is clear, however, that the Board need not be blind to the potential economic impact on the exercise of employees' rights of permitting an employer to wield certain weapons. Indeed, it was with a view to the likely economic consequences that the Court was moved to conclude in *Brown Foods* that unless employers faced with "whipsaw" strike tactics were permitted to lock out union-represented employees and to continue to operate their business with replacements, they would be virtually helpless to respond to such tactics.[10] Given those unique economic realities, the Court therefore found it "wholly consistent with a legitimate business purpose" for the employer to have locked out nonstriking employees and continued its operations with replacements. *Id.* at 285.

Accordingly, the question presented here by Kaiser's attempt to prevent strikers from obtaining work elsewhere is not disposed of in Kaiser's favor merely by labeling Kaiser's actions as the use of an "economic weapon," nor by establishing that Kaiser was merely attempting to enhance its relative bargaining strength in its tool-impoundment tactic, and was not trying to achieve a total removal of the Machinists as the employees' bargaining agent. Instead, in assessing the legality of Kaiser's efforts to preclude strikers from gaining other employment during the strike, I must take into account the potential of that action for "creating visible and continuing obstacles to the future exercise of employee rights."[11]

In doing so, I start with the observation—to me an inescapable one—that Kaiser's tool-impoundment was a plain and visible act of discrimination directed against strikers—and only strikers—which would necessarily be viewed by them as punitive. Strikers could draw no other conclusion from the fact that Kaiser permits employees to remove their tools, including for use in out-

[8] See fn. 15, *supra*.

[9] *N.L.R.B.* v. *Brown et al., d/b/a Brown Food Store*, 380 U.S. 278 (1965); see also *American Ship Building Co.* v. *N.L.R.B.*, 380 U.S. 300 (1965), on which Kaiser also relies.

[10] *Id.* at 284–285, in which the Court sympathized with the "dilemma" of an employer-member of a multiemployer bargaining group in such a situation, noting that the whipsaw strike "enjoys an almost inescapable prospect of success" unless a nonstruck employer-member may defensively lock out unionized employees and continue to operate with replacements.

[11] *Portland Willamette Company* v. *N.L.R.B.*, 534 F.2d 1331, 1334 (9th Cir. 1976).

side work, unless they exercise their right to strike. It is further inescapable in my view that such discrimination necessarily discourages or tends to discourage the future exercise of such protected rights—a consequence which it could be presumed that Kaiser intended,[12] even absent the candid concession of Kaiser's agent, Brundy, that Kaiser specifically intended that its tool-impoundment tactic would have a direct impact on strikers' choices whether to remain on strike. See also in this regard Kaiser's acknowledgement on brief (pp. 2–3) that:

> The primary purpose of this policy is to make it difficult for its striking employees to find interim employment elsewhere during the strike, with the intended result that said employees would be economically induced to terminate their strike on terms more favorable to Kaiser.

Thus, it is evident that if employees whose trade requires them—as the machinists' trade frequently does—to furnish their own tools as a condition of employment, then surely they will be inhibited in future striking by the knowledge that Kaiser will seize their tools and thus minimize their chances of securing outside employment during a strike.

It is properly noticeable in an administrative law system which deals regularly with the phenomena of strikes and other disputes surrounding the collective-bargaining process that strikers normally seek outside earnings during a strike. Thus, it has been observed that "Strikers certainly must support themselves during a strike and other employment is often the best, if not their only means of doing so."[13] It is therefore appropriate to take into account in this analysis the fact that Kaiser's actions, if permitted, would virtually preclude machinists from exercising the traditional option of seeking outside employment in their trade during a strike.

Moreover, I envision a number of additional troubling prospects in giving Kaiser license to impair the outside employment prospects of strikers by impounding their tools. Thus, if Kaiser's position is correct, then it seems equally open to it to use other "economic" measures to prevent strikers' employment elsewhere. For example, Kaiser could presumably use its economic influence in a community to discourage other businesses from hiring employees who have gone on strike against it—in short, to engage in an attempt to "blacklist" strikers in the community.[14] Or, to the extent that it were held that Kaiser may impound the tools which its strikers store in its plant, nothing would then seem to prevent it from sending agents to strikers' homes, garages, or other places where they might store tools in order to seize the tools and hold them hostage as a device to gain bargaining "leverage."[15]

Kaiser also emphasizes on brief (p. 2) that "Kaiser did not prevent employees from removing their tools at the end of their last shift prior to the strike, which many did." The potential legal significance of this information eludes me. If Kaiser's analogy to the lockout in *American Ship Building* is correct, then the presence or absence of a strike-in-progress is irrelevant; and Kaiser would presumably enjoy the right to impound tools on the eve of a strike—or even sooner; i.e., at whatever point at which a bargaining impasse has been reached and Kaiser decides to "bring its economic pressure to bear in support of its bargaining position." *Id.* at 308. Accordingly, Kaiser's failure to impound tools before the strike started does not affect the question of the legality of its admitted actions.

Kaiser argues predictably that the legality of its actions should not be determined solely by reference to the economic disadvantage which those actions visit on strikers. And it is true, as the Court observed in *American Ship Building, (supra* at 313):

> . . . there is nothing in the Act which gives employees the right to insist on their contract demands, free from the sort of economic disadvantage which frequently attends bargaining disputes.

But resort to these and similar comments by the Court, rendered in the context of weighing the legality of an employer's actions taken as part of the exercise of his traditional prerogative to manage his own business, is suspect in the context of this case. In the first instance, as noted above, Kaiser was not performing a traditional business-management function when it told strikers that they could not retrieve their own property from its plant. Traditional business considerations (e.g., prevention of sabotage or theft) were admittedly subordinate to its desire to prevent strikers from working elsewhere. Secondly, as an empirical matter, an employer's effort to interfere with a striker's ability to find interim work elsewhere is not the sort of "economic disadvantage which frequently attend[s] bargaining disputes." Accordingly, the Court's observations in those cases do not dictate the result herein.

While attempts to draw parallels between the rights of strikers and those of struck employers carry with them certain inherent difficulties, it must be recognized that there is a certain one-sidedness in Kaiser's position. At bottom, Kaiser suggests that employers should not only be privileged in continuing to operate with permanent replacements during a strike,[16] thereby maintaining their own flow of earnings, but that they should also be privi-

[12] *The Radio Officers' Union of the Commercial Telgraph Union, AFL [A. H. Bull Steamship Co.]* v. *N.L.R.B.*, 347 U.S. 17,45 (1954); see also *Erie Resistor, supra* at 227–228.

[13] *Connecticut Foundry Company*, 247 NLRB 1514, 1518 (1980).

[14] An employer may not, for the purpose of punishing an employee for exercising his Sec. 7 rights, seek to prevent another employer from hiring the employee. *The Armstrong Rubber Company*, 215 NLRB 620, fn. 1 (1974).

[15] Kaiser nowhere argues that it had some right under property law to refuse to release the machinists' tools upon demand. Indeed, although it need not be determined herein, Kaiser's actions almost certainly involved a tortious conversion of its employees' tools which Kaiser merely held in a form of bailment for their mutual benefit. Kaiser would argue here—correctly, in my view—that its status as a civil or criminal law violator does not, *per se*, determine whether or not it violated employee rights under the Act. Thus, it would argue equally in the hypothetical situation just posed that nothing in the Act prohibited it from seizing employees' tools wherever they might be found.

[16] An established right of struck employers. *N.L.R.B.* v. *Mackay Radio & Telegraph Co.*, 304 U.S. 333, 344–346 (1938), although Kaiser did not choose to exercise it during the strike involved herein.

leged in taking further measures to ensure that strikers not similarly be able to obtain earnings during a strike.

In reality therefore, Kaiser seeks recognition of an entirely new arsenal of economic weaponry for use by struck employers. And, unlike the defensive lockout tactics legitimized by the Court in *Brown Food* and *American Ship Building* as measures which were appropriately tailored to unique business needs,[17] Kaiser's actions were not developed in response to any extraordinary challenge by the striking union. Neither did its impoundment of tools merely involve decisions about how, and under what circumstances, it would "manage its enterprise." *American Ship Building, supra* at 311. Instead, Kaiser sought to reach beyond internal management measures to measures designed to harm employees' options in finding other work in their trade during the strike.

It is not easy to discern precisely what "legitimate interest" of Kaiser's in seizing strikers' tools it is that should be "balanced" against the demonstrable harm to employees' traditional striking rights which were occasioned by Kaiser's actions. Kaiser would presumably claim that it is sufficient to show that Kaiser was merely trying to enhance its bargaining position by its actions. This "business interest" is, however, of an entirely different character than the unique purposes which were served by the respective employers' lockout actions in *Brown Food* and *American Ship Building*. One need not deny the legitimacy of such an interest as Kaiser rests on herein, but it is clearly one which is common to every struck employer; and it is difficult to assume that the Court intended in the cited cases to give blanket approval to any and all "economic" tactics by employers against strikers, without regard to their long-range potential for discouraging the use of the statutory right to strike.

In the final analysis, if the balancing function of the Board is to have substance, it must include an assessment of the economic impact on employees—and hence on their exercise of protected rights—of "weapons" chosen by employers to achieve for themselves the greatest possible bargaining leverage. If Kaiser may take advantage of the fortuities of its tool-storage arrangement to prevent the removal of those tools from its plant for use by strikers in interim employment elsewhere, there is no obvious reason why Kaiser could not with equal claim of legitimacy under the Act take other measures to prevent strikers from working elsewhere. And, if an employer may impair or frustrate entirely strikers' abilities to find other employment while the employer remains free to operate his business through the use of permanent replacements, then the exercise of the right to strike will be hollow indeed. For the obtaining of other employment by strikers has been the primary means by which they survive a strike of any substantial duration; and they will not exercise the right to strike if it means that they must bankrupt themselves to do so.

[17] Maintenance of the integrity and bargaining effectiveness of a multiemployer group faced with whipsaw strikes (*Brown*); control over the timing of a business shutdown after bargaining impasse and where employer reasonably apprehended that the union would defer striking until time most damaging to employer (*American Ship Building*).

Congress, in exhibiting "repeated solicitude" for the right to strike,[18] did not thereby purport to guarantee that strikers would feel no economic pinch, or that they would always be successful in their striking aims, but it was at least contemplated that: "[a] legitimately-employed strike . . . in great measure implements and supports the principles of the collective bargaining system."[19]

The use of "weapons" calculated to render it difficult or impossible for strikers to obtain earnings elsewhere during a strike would render most striking economically futile from the employees' standpoint, and would thus eliminate the exercise of a right deemed important by Congress in "implement[ing] and support[ing]" the goals which Congress had in mind in establishing a national system of collective bargaining. *Ibid.*

Accordingly, I must conclude that Kaiser's actions were inherently destructive of important rights guaranteed to employees by Sections 7 and 13 of the Act. I must further conclude that Kaiser's claim of business justification—the desire to achieve leverage in collective bargaining—does not outweigh the considerations of public policy which are reflected, *inter alia*, in the "special deference" Congress gave to the right to strike including by the "positive command of Section 13 that the right to strike is to be given a generous interpretation within the scope of the . . . Act."[20]

## CONCLUSIONS OF LAW

1. Kaiser is an employer engaged in commerce within the meaning of Section 2(6) and (7) of the Act.

2. The Machinists is a labor organization within the meaning of Section 2(5) of the Act.

3. Employees represented by the Machinists were engaged in concerted striking activity protected by Sections 7 and 13 of the Act when, between July 11 and July 24, 1980, they honored a primary economic strike and picketing and refrained from entering Kaiser's Napa plant to perform their normal work there.

4. By refusing to permit such striking employees to remove their personally owned tools from its Napa plant in order to impair their ability to obtain other employment during the strike and under circumstances where Kaiser normally permits its nonstriking employees to remove their tools for their own purposes, Respondent has interfered with, restrained, and coerced employees in the exercise of rights protected by Sections 7 and 13 of the Act, and has discriminated against employees with respect to their terms and conditions of employment in order to discourage membership in, or activities on behalf of, labor organizations, and thereby has engaged in and is engaging in unfair labor practices within the meaning of Section 8(a)(1) and (3) of the Act.

## THE REMEDY

Having found that Kaiser violated Section 8(a)(1) and (3) of the Act by its tool-impoundment tactic against

[18] *Erie Resistor, supra* at 233.

[19] *Id.* 233–334, citing legislative history.

[20] *Id.* at 234–335.

strikers, I shall recommend that Kaiser be ordered to cease and desist from those, or like or related, actions; and that it take certain remedial action, including the posting of a remedial notice to its employees at its Napa plant.

There is a question whether Kaiser should also be subjected to a "make whole" order. The proof at the hearing revealed that employees Martin and Boyles were prohibited from removing their tools, but Martin further testified that he was able to locate another toolset to use on the interim job which he had secured. Boyles states that he made two unsuccessful efforts to find interim work,[21] but then gave up, "knowing that I couldn't get a job because I couldn't get my tools." The General Counsel's brief is silent as to the appropriate remedy for the violation which he alleged. *Fraley & Schilling* does not provide clear guidance on this question.[22]

It strikes me as entirely appropriate, in the present circumstances, however, that Kaiser be ordered to make whole any strikers who were impaired in their ability to obtain earnings during the strike by Kaiser's refusal to let them remove their tools from the plant. Neither does it appear to be fatal to the propriety of such a make-whole order that no specific employee was shown at the unfair labor practice stage of these proceedings to have been denied some available job because of Kaiser's unlawful practices, especially where it would have been "futile" for strikers to have attempted to find such work when Kaiser was wrongfully impounding their tools. See, e.g., *Pipeline Local Union No. 38, affiliated with the Laborers' International Union of North America, AFL-CIO (Hancock-Northwest, J. V.)*, 247 NLRB 1250, 1251 (1980), and authorities cited. The complaint attacked Kaiser's general prohibition against removal of tools by strikers, and Kaiser admits that it was acting pursuant to a general policy and not merely withholding tools from particular individuals. Under those circumstances, I would not preclude the General Counsel from showing at the compliance stage, if the facts may so reveal, that strikers, including Boyles and others, were injured financially by Kaiser's refusal to release their tools. I have therefore provided in my recommended Order that Kaiser make any such employees whole, with interest, in accordance with established Board policies for the computation of backpay.[23]

[21] Boyles' lack of success in the two job-search contacts he mentioned was because those firms had no openings—not because he had no tools.

[22] In that case, the administrative law judge did not clearly explicate why he found it appropriate that employees Clark and Woods be made whole for losses sustained in connection with the discriminatory repossessions, but not for periods while they were on strike (211 NLRB at 444). It may be that the Board, in adopting this portion of the administrative law judge's remedial recommendations—believed that the employer's "exclusive lease-back" rights would not have permitted striking owner-operators to use the trucks to gain independent earnings.

[23] *F. W. Woolworth Company*, 90 NLRB 289 (1950); *Isis Plumbing & Heating Co.*, 138 NLRB 716 (1962); and *Florida Steel Corporation*, 231 NLRB 657 (1977). See also *Olympia Medical Corporation*, 250 NLRB 146 (1980).

Upon the foregoing findings of fact, conclusions of law, and upon the entire record herein, I issue the following recommended:

## ORDER[24]

The Respondent, Kaiser Steel Corporation, Napa, California, its officers, agents, successors, and assigns, shall:

1. Cease and desist from:

(a) Penalizing employees who are engaged in a lawful economic strike by discriminatorily refusing to permit them to remove their tools from its plant in order to prevent them from obtaining interim work elsewhere.

(b) In any like or related manner interfering with, restraining, or coercing employees in the exercise of rights guaranteed in Sections 7 and 13 of the Act, or discriminating against them with respect to their terms and conditions of employment in order to discourage membership in or activities on behalf of a labor organization.

2. Take the following affirmative action necessary to effectuate the purposes of the Act:

(a) Make whole with interest any employees who suffered losses of earnings during the period July 11-24, 1980, because they were prevented, in furtherance of Kaiser's unlawful tool-impoundment policy, from removing their tools to work at interim jobs.

(b) Preserve and, upon request, make available to the Board or its agents, all records which would aid in establishing the identities of striking employees in the period July 11-24, 1980, and any such employees who attempted unsuccessfully to remove their tools from Kaiser's Napa, California, plant.

(c) Post at its Napa, California, plant copies of the attached notice marked "Appendix."[25] Copies of the notice, on forms duly provided by the Regional Director for Region 20, after being duly signed by Kaiser's authorized representative, shall be posted immediately in conspicuous places, including in all places where notices to employees are customarily posted, and shall remain posted for 60 consecutive days thereafter. Kaiser shall take reasonable steps to ensure that such notices are not altered, defaced, nor covered by any other material.

(d) Notify the Regional Director for Region 20, in writing, within 20 days from the date of this Order, what steps Respondent has taken to comply with it.

[24] In the event no exceptions are filed as provided by Sec. 102.46 of the Rules and Regulations of the National Labor Relations Board, the findings, conclusions, and recommended Order herein shall, as provided in Sec. 102.48 of the Rules and Regulations, be adopted by the Board and become its findings, conclusions, and Order, and all objections thereto shall be deemed waived for all purposes.

[25] In the event that this Order is enforced by a Judgment of a United States Court of Appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."